

Testimony of Congressman J.D. Hayworth Before the Regulatory Affairs Subcommittee on July 27, 2005

Madame Chairwoman, members of the subcommittee, and distinguished guests, thank you for affording me this opportunity to discuss one of the most fundamental reforms this Congress can undertake: ending the unconstitutional delegation of legislative powers.

Reducing regulatory red tape will increase American businesses' ability to compete in the world market. Unfortunately, government regulation and bureaucracy are significant impediments to the success of every business.

For too long, Congress has ceded its law-making authority to unaccountable, un-elected employees in the executive branch. Not only does this contradict the Constitution's "separation of powers" by making the executive branch the maker and enforcer of law, but it violates Article I, Section 1 of the Constitution, which states that, "All legislative powers herein granted shall be vested in a Congress of the United States." My testimony will focus on the unconstitutionality of delegation and why it makes for bad government.

My testimony today focuses on H.R. 931, the Congressional Responsibility Act, legislation I first introduced on December 6, 1995. I believe it is a long-term solution to our regulatory problem.

I believe our Founders understood the negative implications of the delegation of power. For this reason, the Founders defined the various roles of the three branches of government and emphasized their "separation of power."

For the first 150 years of our republic, the Supreme Court held that the transfer of legislative powers to another branch of government was unconstitutional. In the late 1930s, however, the Court reversed itself, and upheld laws by which Congress merely instructed agencies to make decisions that served "the public interest." Since then, Congress has ceded its basic legislative responsibility to executive agencies that craft and enforce regulations with the full force of law. The Supreme Court has not invalidated a single delegation of power since 1935. Unfortunately, law-making was never intended to be in the hands of executive branch employees. As the Constitution enumerates, the power to make laws was solely vested in Congress, because Congress is directly accountable to the people.

Today, evidence abounds that Congress has slipped from its constitutional moorings. The American with Disabilities Act tells employers to make "reasonable accommodation" of handicapped workers unless there is an "undue hardship," but leaves it to the Department of Justice to determine what is reasonable and required.

Similarly, the Occupational Safety and Health Administration (OSHA) calls for workplace standards that are “reasonable, necessary or appropriate to provide safe and healthful employment” but allows the Secretary of Labor to decide what that means. The Clean Water Act mandates the protection of “navigable rivers” and permits the Army Corp of Engineers and the Environmental Protection Agency (EPA) to exercise control over any land that has certain minimum water content. By law, commercial banks can only affiliate if they are “well capitalized,” a vague determination made by the Federal Reserve Board and the Federal Deposit Insurance Corporation (FDIC).

Thus, delegation gives life to bad laws because it allows legislators to make ambiguous laws for which they can take credit without taking responsibility for their legal consequences or their costs. Congress can reap the benefits of delegation and its excesses by helping constituents through the complexities of federal regulations. At the same time, it can blame bureaucrats for misinterpreting its intentions. The legislator can play both sides and win. Unfortunately, the loser in all of this is the electorate.

With delegation, we also sacrifice accountability in government. Originally designed to be the most accountable branch of government, Congress has grown increasingly irresponsible. The fundamental link between voter and lawmaker has been severed by un-elected regulators hiding behind bad laws. A handful of broadly written laws have spawned an alphabet soup of government agencies and an overwhelming regulatory burden that undermine the very idea of representative government. Many regulatory analysts believe more consequential law is generated in the executive branch than in the legislative branch. Even the *Federal Register*, which churned out 4,167 rules and regulations in 2002, admits that Congress has ceded much of its law-making ability to the executive branch. In the explanation of the *Federal Register's* purpose, it states that it “provides a uniform system for making available to the public regulations...having legal effect.”

When you consider that Congress passed and the President signed into law only 269 bills in 2002, agency rulemaking stands out as a significant problem. Bureaucrats are outpacing Congress over 15 to 1 in approving new rules.

Further, delegation allows powerful special interests to expend substantial resources in private to benefit the few at the expense of many. Simply put, if we are to restore integrity, responsibility, and confidence to the federal government, one of the best ways we can do this is by ending the unconstitutional delegation of legislative powers to the executive branch.

The Founders knew that law-making authority vested in Congress would make for good government because our elected officials would be directly accountable to their constituents. I often ask my constituents: Do you believe unaccountable employees in the executive branch should have the power to make laws? To this day, I have not heard one person answer this question in the affirmative. My constituents understand the ramifications of granting broad powers to the executive branch to make laws. Yet, to the

chagrin of most of my constituents, this is the case in America today. It is no wonder why my constituents, and the American people, are so disillusioned with government.

H.R. 931 will rightly return legislative powers to the Congress by requiring Congress to vote on all rules and regulations, as defined in section 551(4) of title 5, United States code, except those regulations of particular applicability, any interpretive rule, general statement of policy, or any regulation of agency organization, personnel, procedure, or practice. My legislation will apply only to new regulations and will not be retroactive.

Detractors will say that there is no way that Congress has the time to review all rules and regulations that are promulgated by the executive branch. Regardless of the time it takes, it is Congress's duty to review rules and regulations, as enumerated in Article I, Section 1 of the Constitution. Moreover, I have had the honor and privilege of serving as Speaker Pro Tempore. On more than one occasion, I have presided over largely ceremonial debate in which we took several hours to name federal installations after famous Americans. I ask you: If we can name courthouses, airports, military bases, and other places, don't we have enough time to vote on rules and regulations that profoundly affect the citizens of this country?

With these time constraints in mind, however, the Congressional Responsibility Act provides an expedited procedure for considering rules and regulations. Within three days after an agency promulgates a rule, the Majority Leader of both the House and Senate (by request) must introduce a bill comprised of the text of the regulation. If the bill is not introduced in three days, any Member thereafter may introduce the bill. The bill is not referred to a committee unless a majority of Members agree to send it through the normal legislative process. Within 60 days of being introduced, however, the legislation must come before the respective chamber for a vote. The bill shall be limited to one hour of debate and cannot be amended. If a majority of members of the body vote for the bill, it is sent to the other body for approval. Upon approval of both bodies, the legislation is sent to the President to sign or veto.

Other opponents of this legislation might argue that this would delay the implementation of rules and regulations. In reality, though, it would not. Rules and regulations are often the subject of countless and endless lawsuits. For example, the final rule for leaded gasoline took nearly 10 years to promulgate because it was the focus of intense litigation. Congress becomes the final arbiter in rule making and the Congressional Responsibility Act states that a regulation contained in a bill is not an agency action for the purpose of judicial review under chapter 7 of title 5, United States Code. This would bring to a halt litigation that delays implementation of regulations.

Finally, opponents of delegation will say that this is a backhanded attempt at regulatory reform. The Constitution makes clear that all legislative powers shall be vested in Congress. Article I asserts that this legislative power includes the power to regulate. By returning the power to regulate to Congress, we will make Congress accountable to the people for federal laws. This will make for better government a laudable goal that we, as well as the American people, desire.

In my opinion, delegation is one of the root causes of the American people's disenchantment with government. We can take a step in the right direction by ending the unconstitutional delegation of powers. By taking this step, we will help restore confidence and integrity to the federal government. Many people agree with this analysis, and that is why the concept of non-delegation is embraced by both liberals, such as Nadine Strossen of the American Civil Liberties Union (ACLU), and conservatives, such as Judge Robert Bork. In fact, it was now-Justice Stephen Breyer who wrote in 1984 how the legislative veto should be replaced by an expedited procedure for Congress to pass rules and regulations.

I want to end my testimony by quoting John Locke's admonition that "the legislative cannot transfer power of making the laws to any other hands." Delegation without representation is as wrong today as taxation without representation was in the 1700s. It is time Congress took back its constitutionally granted power to make laws.

Again, I want to thank you Madame Chairwoman, as well as the subcommittee members, for allowing me to have this opportunity to testify here today. This Congress has talked a lot about reform. I think that ending the delegation of powers from the legislative to the executive branch could be the most important reform this Congress addresses. I am hopeful that we can make a substantial change to this glaring problem in the next year.